IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SALES TAX REFERENCE No. 6 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S.GRACE PAPER INDUSTRIES LTD - Applicant(s)
Versus
THE STATE OF GUJARAT - Respondent(s)

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Appearance :
MR TANVISH U BHATT for Applicant(s)
MR SUNIT SHAH, GP with MS KRINA P.CALLA, AGP for Respondent(s)

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 11/06/2007

ORAL JUDGMENT (Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. At the instance of the assessee, the Gujarat Sales Tax Tribunal, Ahmedabad, has referred the following question of law arising out of its decision in Second Appeal No.67 of 1988 for the opinion of this Court as contemplated by Section 69 of the Gujarat Sales Tax Act, 1969 ("the Act" for short):

> *When purchases are made on payments of tax and sales of goods manufactured therefrom are exempt from tax under Entry 118(3), whether the amount of tax that otherwise would have been admissible as set off under Rule 42 should be adjusted towards the amount of tax exempted under Entry 118(3) and the net amount remaining after such adjustment should only be taken into consideration for the purpose of aggregation of tax exemption limit?*

2. The assessee is a dealer registered under the provisions of the Act as well as under the Central Sales Tax Act, 1956. It set up a new industry in a backward area. Therefore, it was granted necessary eligibility certificate by the Industries Department and Exemption Certificate under Entry 118 of the Government

Notification issued under Section 49(2) of the Act. While assessing the applicant for the period from July 1, 1982 to June 30, 1983, the Sales Tax Officer aggregated the benefits utilized by the assessee by including the notional tax on the sales which are considered as exempt under Entry 118(3) of the aforesaid Notification. He also included the notional tax in respect of the Inter-State sales made, which are considered as exempt under Section 8(5) of the Central Sales Tax Act read with the Notification issued under that Section. The assessee had made purchases against Form-I as prescribed under Entry 118(2) according to which the sales of the registered dealers who had effected such sales to the applicant against such Form were exempted from tax. The contention raised by the assessee that the notional tax on the sales be worked out after allowing the set off under Rule 42 of the Gujarat Sales Tax Rules, 1970, was negatived by the Sales Tax Officer.

3. Feeling aggrieved by the aforesaid method of working out of the aggregation under the general condition of Entry 118, an Appeal was filed by the assessee, but the same was dismissed by the first appellate authority. Therefore, Second Appeal No.67 of 1988 was filed before the Tribunal. The contention that set off under Rule 42 of the Rules should be first worked out and adjusted against the notional tax on sales and only the balance should be adjusted against the limit of utilizing exemption was negatived by the Tribunal. The Tribunal dismissed the Second Appeal filed by the assessee vide order dated September 5, 1992, along with other group matters including the Revisions filed by Cynamide Chemicals Company, giving rise to the above numbered Reference.

4. This Court has heard Mr.Tanvish U.Bhatt, learned counsel for the applicant and Mr.Sunit S.Shah, learned Government Pleader for the opponent, at length and in great

detail.

5. It may be mentioned that feeling aggrieved by the common judgment dated September 5, 1992, rendered by the Gujarat Sales Tax Tribunal in Revision Applications No.88 and 89 of 1990, as well as other cognate matters, the assessee, i.e. Cynides Chemicals Company had sought Reference to the High Court involving determination of similar question which arises for consideration of this Court in the instant Reference and the Division Bench comprising Rajesh Balia and A.R.Dave, JJ., has answered Sales Tax Reference No.10 of 1997 in the affirmative, that is to say, in favour of the Revenue and against the assessee, by judgment dated December 4, 1998.

6. Rule 42 of the Gujarat Sales Tax Rules, 1970, reads as under:

> *"Drawback, set off, or refund of tax for the goods purchased by a manufacturer:*
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> *In assessing the tax payable by a manufacturer (hereinafter referred to as*

the `assessee'), the Commissioner shall, subject to the general conditions of rule 47, and further condition specified below, grant him drawback, set off or as the case may be refund, of the whole or any part of the tax in respect of the purchases of goods used by him in manufacture.....”

Rule 42 deals with drawback, set off or refund of tax for the goods purchased by a manufacturer. It operates at the time while assessing the tax payable by a manufacturer and interalia provides that the Commissioner shall, subject to the general conditions of Rule 42 and further conditions specified therein, grant a manufacturer, drawback, set off or as the case may be, refund of the whole or any part of the tax in respect of the purchases of goods used by him in the manufacture. The rate of tax is prescribed on sale price of the goods at the rate notified for that purpose. The sales tax being a specie of indirect tax, the burden of it is passed on to buyer. The price charged from a

purchaser may disclose element of tax charged separately in the bill from the sale price. However, it is not necessary to disclose the price bifurcation separately and a dealer may charge in lump sum. In the former case, the sales tax actually collected is deducted from total amount charged to find out taxable turnover on which tax is to be charged under sub-rule (2) whereas in the latter case, as the price contains element of tax, for determining taxable turnover, the tax element charged from the customer is to be separated therefrom by applying formula stated in sub-rule (4). Thus, pre-condition for operating under this Rule is that the sale price charged by dealer must contain element of sales tax whether shown separately or as part of sale price but not shown separately so that the turn over on which sales tax is actually payable is found out. Where the sale price charged by the dealer in fact does not contain any element of tax and it cannot contain such element because tax is not

actually payable by him, there is no room for determining taxable turnover on which tax is notionally leviable. Where tax is actually not payable but it is to be determined notionally for some other purposes, Rule 42 will have no application at all. The reading of Rule makes it more than clear that it does not provide abstract proposition of reducing the sale price by any formula in the matter of taxable sales but depends on what adjustment has to be made on the option of the assessee. If the assessee has collected tax, separately by way of sales tax or general sales tax, such amount is to be reduced from the total amount charged by him showing sale price and tax separately. However, when no such separate disclosure of sale price and tax on such sale price is made in the invoices, then from such sale chargeable to tax, the same calculated as per formula stated in sub-rule (4) is to be deducted to find out actual sale price without element of any tax into it, in order

to determine the actual tax payable by the assessee. Further, the assessee was not liable to pay tax on the sales of the new industrial unit which had been classified as pioneer industry and therefore, not entitled to charge any tax separately or inclusively as a part of its price from its purchasers. If any part of sale price is attributable to collection of tax thereon, the assessee would be committing breach of conditions of exemption and would be liable to lose such benefit. Therefore, there is no warrant to hold that for the purpose of tax leviable on the sale price collected by it, the price should be further reduced by a sum attributable to tax chargeable of it on the rate prescribed for the commodity in question by deeming that the sale price charged by it though in fact did no include any tax, yet for the purpose of computing tax leviable, the sale price had ingredient of tax chargeable thereon. In effect, the assessee's contention is founded by

converting the limit of exemption from payment of tax determined under the provisions of incentive scheme into exemption of gross turnover on which tax is payable and then to find out such amount of tax which would be payable on the discounted value in terms of Rule 42. This would be altering the very edifice of the exemption spelt out in the scheme by substituting the assessee's own formula of determining the extent of benefit which is is not permissible.

7. Under the present scheme, under Entry 118, the sales of the specified manufacturers are exempt from payment of tax. The word “set off” would suggest that the amount of purchase tax has to be set off against tax payable by a manufacturer. Therefore, when no amount of tax is at all payable, the question of invoking the provisions of Rule 42 would not simply arise. It is well-settled principle of interpretation of statute that nothing should be read in a provision of a

statute which is not there even impliedly. Therefore, when no provision for set off has been made, the question of reading such a provision as suggested by the assessee does no arise.

8. The view taken by the Tribunal that the provisions of Rule 42 cannot be read in the Scheme and applied while considering the amount of sales tax to be taken into aggregation is eminently just and deserves to be upheld.

9. For the foregoing reasons, the question referred to this Court is answered in the affirmative, that is to say, in favour of the Revenue and against the assessee. There shall be no orders as to costs.

(J.M.Panchal, J.)

(Smt.Abhilasha Kumari, J.)

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